IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 57 of 1992
with
CRIMINAL APPEAL No 81 AND 182 OF 1992

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SANKUBEN HAMIR
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 57 of 1992
MR DEEPAK M SHAH for Petitioner No. 1
Mr K P Raval, Addl.PUBLIC PROSECUTOR for Respondent No. 1
2. Criminal Appeal No. 81 of 1992
MR DEEPAK M SHAH for Petitioner No. 1
MR K P Raval, Addl.PUBLIC PROSECUTOR for Respondent No. 1
3. Criminal Appeal No.182 of 1992
Mr P J Yagnik for petitioner
Mr K P Raval, Addl.Public Prosecutor for respondent no.1

CORAM : MR.JUSTICE B.J.SHETHNA
and

MR.JUSTICE D.P.BUCH

Date of decision: 26/11/2001

ORAL (COMMON) JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

These three appeals are filed by the original accused persons who faced trial before the learned Sessions Judge, Surendranagar in Sessions Case No.57/90 for offences punishable under Section 302, 147, 148, 149, 201, 343 and 506(2) of IPC as well as for offences punishable under Sections 25(1)(a) & (b) as well as under section 27 of the Indian Arms Act. Since the trial had proceeded against all the accused persons jointly and since they have been convicted by the learned Sessions Judge by one judgment and conviction order dated 30.12.1991, we find it appropriate to dispose of all these three appeals by this common judgment. Learned Advocates for the respective parties have argued the matter jointly and, therefore, also it is appropriate and necessary to dispose of all the three appeals jointly by this common judgment.

2. The facts of the case as stated by the original informant may be briefly stated as follows:

The incident is said to have taken place at about 4.30 p.m. on 13.5.1990 at village Parnala in Limdi Taluka, Surendranagar District. The deceased, informant and the original accused persons are very closely related to one another. Original accused No.1-Hamirbhai is the father of the two other accused persons Ratilal and Dahyabhai. The father and sons are the appellants in Criminal Appeal No.81/92. Bai Champaben Dahyabhai who is the appellant in Criminal Appeal No.182/92 is the wife of original accused No.3-Dahyabhai Hamirbhai, whereas Bai Sankuben who was accused no.5 before the trial court is the appellant in Criminal Appeal No.57/92. Deceased Bhagwanbhai Hamir was the son of accused no.1-Hamirbhai and was the brother of the other two accused persons Ratilal and Dahyabhai. Original informant-Hiraben is the widow of deceased Bhagwanbhai. It is the case of the prosecution that deceased Bhagwanbhai was staying with informant Hiraben in a house just adjacent to the house occupied by the appellants. It is also the case of the prosecution that on the date of the incident, deceased Bhagwanbhai was digging the wall between the properties of the deceased as well as of the appellants. At this stage, the appellant Hamirbhai arrived there and asked the deceased not to dig the wall. It is the case of the prosecution that the deceased insisted on digging the

wall and continued to do so. The prosecution has further alleged that at that time, the accused Hamirbhai had fired a shot from a country revolver (tamancha) at deceased Bhagwanbhai. It is also the case of the prosecution that the said accused Hamirbhai had brought the said country revolver with him at the spot. The pellets hit the left portion of the body of the deceased Bhagwanbhai at which Bhagwanbhai had fallen on the ground. The prosecution has further alleged that another accused Ratilal Hamirbhai had brought a gun on the spot and had fired gunshot at the deceased Bhagwanbhai on account of which the said pallets hit the chest of the deceased. Thereafter, the third accused i.e. Dahyabhai Hamirbhai also brought a weapon and dealt two blows on the deceased. It is further the say of the prosecution that accused Bai Champaben who was accused No.4 before the trial court had also brought dharia on the spot and had hit three blows of dharia on the person of the deceased. The prosecution has further alleged that original accused no.5-Sankuben was also present there and according to the case of the prosecution, she was shouting that deceased Bhagwanbhai Hamirbhai should not be allowed go alive and he should be killed. The prosecution has further alleged that thereafter the accused persons had threatened the informant and her son Jagdish, who was also present on the spot at the aforesaid place of incident. Thereafter, according to the case of prosecution, the accused persons brought a piece of cloth from the residence of the informant and the dead body of the deceased was tied in the said cloth and thereafter the accused persons had taken away the said dead body of the deceased Bhagwanbhai in a cart of the informant which was lying in the said compound. Thereafter, room of the informant was closed and it was chained from outside. The prosecution case is that the informant did not know as to where the body of the deceased taken thereafter by the accused person.

3. Thereafter, one son and two daughters of the informant Hiraben had arrived from their Wadi at the spot and when they opened the door, they enquired as to why their meal was not brought to the wadi. At that time, the informant Hiraben informed them about the aforesaid incident and had told them that the accused persons did not allow them to move out. At that time, there was a marriage ceremony in the family of the informant. It was noticed that Hiraben had not gone to attend the ceremony, therefore, her brother came to the residence of Hiraben. He had brought a tractor with them. It is the case of the prosecution that the informant Hiraben informed her brother about the aforesaid incident and thereafter the

brother took the informant to an Advocate at Surendranagar, Mr V B Shah.

4. The prosecution has further alleged that the informant Hiraben had given details of the aforesaid incident to the Advocate Mr V B Shah who drafted a complaint and obtained thumb mark of Hiraben and sent it to the concerned police station i.e. Panshina police station by registered post. The said FIR was received by the said police station on 17.5.1990 at 12.30 p.m. Thereafter an offence was registered and investigation was undertaken and all the accused persons were arrested. Muddamal properties and the weapons were seized under discovery panchnama and muddamal articles were referred for expert opinion to the chemical analyzer. After the conclusion of the investigation, charge-sheet was filed before the learned Judicial Magistrate First Class, Limdi. Since the case was exclusively triable by the Court of Sessions, the learned Judicial Magistrate First Class, Limidi committed the said case to the Sessions Court at Surendranagar. Accordingly the case was received there and was registered there as Sessions Case No.57/90.

5. Learned Sessions Judge supplied copies of the police investigation papers to the appellants and thereafter he framed charge at Exh.3 for the aforesaid offence. The appellants pleaded not guilty of the said charges and, therefore, the learned Sessions Judge proceeded to record the evidence against the appellants. The prosecution examined the following witnesses at the trial:

(i) PW 1 Hiraben, widow of deceased Bhagwanbhai Exh.14
(2) PW 2 Mr V B Shah, Advocate Exh.16
(3) PW 3 Jagdish, son of the deceased Exh.18
(4) PW 4 Gora Jaisingh, brother of Hiraben Exh.19
(5) PW 5 Zaver Dansingh, Panch Exh.25
(6) PW 6 Jerambhai Mathurbhai, Panch Exh.32
(7) PW 7 Jagmalbhai Bhimbhai, Head Constable Exh.34
(8) PW 8 Mangalsingh, Head Constable, Panshina Exh.36
(9) PW 9 Prithvisinh, PSI Exh.37
(10)PW10 N G Vanzara, PSI Exh.40

After conclusion of evidence, the learned Sessions Judge recorded further statements of the appellants under section 319 of the Criminal Procedure Code, 1973. Then, after hearing the arguments on behalf of the parties and after appreciation of the evidence and after looking into the points of arguments advanced on behalf of the parties, the learned Sessions Judge found that the

appellants were guilty of the aforesaid offences, he also found that the evidence produced by the prosecution was reliable. The learned Sessions Judge also found that all the appellants were guilty of the aforesaid offences. Thereafter, the learned Sessions Judge heard the appellants on the point of quantum of sentence and thereafter the learned Sessions Judge sentenced all the appellants for offences punishable under Section 302 read with section 149 of IPC and sentenced them to suffer R.I. for life and further directed to pay fine of Rs.1,000/-. So far as the other offences are concerned, though the appellants were found guilty of the offences and, though were convicted, no separate sentence has been recorded by the learned Sessions Judge for those offences. The learned Sessions Judge also passed appropriate order for the disposal of the muddamal articles.

6. Feeling aggrieved by the said judgment and conviction order of the learned Sessions Judge, the appellants have filed three different appeals before this Court. As said above, all the appeals arise from one and same judgment and conviction order and therefore, they are being heard and disposed of by this common judgment.

7. At the commencement of the argument, learned Advocates for the appellants have made it clear that Bai Sankuben who was accused No.5 before the trial court and who was the wife of accused no.1 and mother of deceased Bhagwanbhai had died during the pendency of the appeal. It is further made clear on behalf of the appellants that even Hamirbhai and Ratilal who happened to be accused No.1 and 2 before the Sessions Court and who have filed Criminal Appeal No.81/92 have also passed away. It is a matter of record that Dahyabhai Hamirbhai is the son of Bai Sankuben and Hamirbhai. He is the brother of Ratilal. Same way, Bai Champaben is the daughter-in-law of Hamirbhai Chaganbhai and Sankuben and she is the wife of brother of deceased Ratilal. Therefore, on behalf of these two appellants, learned Advocates have made it clear that these appellants who are the legal representatives of the deceased appellants Hamirbhai, Ratilal and Sankuben do not desire to prosecute the appeals of Bai Sankuben, Hamirbhai and Ratilal Hamirbhai. Even otherwise, the legal representatives have not been joined in time in accordance with the requirement of section 394 of Criminal Procedure Code, 1973. In above view of the matter, Criminal Appeal No.57/92 filed by deceased Bai Sankuben Hamir who was accused no.5 before the Sessions Court stands abated. Same way, in Criminal Appeal No.81/92 qua Hamirbhai Chhagan and Ratilal Hamir also stands abated. At the same time, in Criminal Appeal

No.81/92 qua Dahyabhai Hamir and Criminal Appeal No.182/92 of Bai Dahyabhai will also stand. Therefore, we will be required to deal with the offences, if any, committed by Dahyabhai and Bai Champaben Dahyabhai.

8. At the commencement of the argument, learned APP has argued at length that there is sufficient evidence on record to show that appellant Dahyabhai Hamir had dealt two blows of Farsi on the person of the deceased and the appellant Bai Champaben had dealt three dharia blows on the neck of the deceased and they have actually participated in the aforesaid offence. It is also argued by the learned APP that the informant Hiraben and Jagdish were the natural eye witnesses to give true version of the incident in question that they were present at the spot that their presence is natural and even their version is very natural and therefore, there is no reason to disbelieve the versions of the two eye witnesses. It is also his argument that these two witnesses had no reason to falsely implicate the appellant Dahyabhai and Bai Champaben in the present event. In that view of the matter, according to his argument, when the learned Sessions Judge has appreciated the evidence and found their evidence reliable, it would not be necessary or proper for this court to set aside the said findings of the learned Sessions Judge. It is therefore, his argument that the appellants of these two appeals Dahyabhai and Bai Champaben therefore, deserve to be dismissed.

9. On the other hand, learned Advocates appearing for these two appellants have also argued at length that these two witnesses were very closely related to the deceased. It is also their case that the relations between the two groups were not happy and cordial. It is also their case that when the deceased was already killed by country pistol and gunshot, there was no necessity for these two appellants to inflict further blows on the person of the deceased. It is also their case that since the dead body has not been traced out, it is not possible to show anything about the injuries present on the person of the deceased. Therefore, the said evidence of the said two eye witnesses has not been amply corroborated by medical evidence or by inquest panchnama. That in that view of the matter, at least benefit of reasonable doubt is required to be extended to the appellant Dahyabhai and Bai Champaben by holding that these two appellants have not been involved in the commission of the offence in question. They have, therefore, submitted that the appeals of these two appellants are required to be allowed and these two appellants are required to be

acquitted from the charges levelled against them.

10. Learned advocates for the parties have taken us through the evidence on record before the trial court. Hiraben is the first witness who has been examined before the trial court at exh.14. It is true that she has deposed that the appellant Hamir and Ratilal had dealt country revolver-shot and gunshot on the person of the deceased. It is also deposed by this witness that thereafter the appellant Dahyabhai had dealt two blows with farsi on the person of the deceased and thereafter appellant Bai Champaben had also dealt three blows with dharia on the person of the deceased. Now as said above, the dead body of the deceased has not been traced out and, therefore, there is no corroboration of medical evidence. Moreover, the inquest panchnama could not be drawn for want of dead body of the deceased and, therefore, vital corroboration to the evidence of Hiraben at Exh.14 is not on record. So far as the nature of injuries sustained by the deceased is concerned, it is to be seen that when the deceased had already died on account of injuries sustained by him at the hands of the appellants Hamirbhai and Ratilal, there was no necessity for Dahyabhai Hamirbhai to inflict further blows with farsi. Same way there was no need or reason for Champaben to inflict on the person of the deceased. So far as deceased Sankuben is concerned, her appeal has already abated and, therefore, it is not required to consider the evidence tendered by Hiraben against her. The witness has been cross-examined on behalf of the appellants. It appears that the houses of the parties are situated in residential locality. The informant Hiraben has clearly deposed that shouts were raised but nobody was there to witness the event on the spot. Therefore, the oral testimony of this witness has not been corroborated by any other independent evidence. Then we take evidence of Jagdish, who was son of the deceased Bhagwanbhai and is also the son of the informant Hiraben. His evidence has been recorded at Exh.18. He has also given the similar version as has been given by his mother Hiraben. The evidence of these two witnesses is almost identical and similar. It is true that evidence of this witness supports and corroborates the testimony tendered by his mother Hiraben. Here also it is very clear that when the deceased has sustained blows at the hands of original accused no.1 and 2 and the deceased had already died or he was at the verge of death and, therefore, there was no reason for the appellant Dahyabhai as well as appellant Bai Champaben to cause further injuries to their brother and brother-in-law. Again the dead body has not been traced out and,

therefore, there is no corroboration with respect to the actual injuries sustained by the deceased at the hands of the appellants. So far as other eye witnesses are concerned, there is no witness to the event.

10. The first witness is Advocate Shri V B Shah who has been examined before the trial court at Exh.16. He has simply drafted the FIR at the instance of the informant Hiraben. He has given evidence to that effect at Exh.16. Thereafter, the FIR was sent by Registered A.D. Post to Panshina police station as well as to the DSP of Surendranagar District after obtaining thumb mark of Hiraben on the said FIR. Now it is to be seen that the incident had taken place and thereafter, the FIR has gone to the police station. The incident had taken place on 13.5.1990 and the FIR was received by the police station on 17.5.1990. Therefore, there was some time lag between the date of commission of offence and the date on which the FIR was received by the police station. Another aspect of the case is that so far as the evidence of Mr V B Shah at Exh.16 is concerned, rough work which may have been done by him while obtaining instructions from Hiraben, has not been maintained or preserved or produced. Moreover, there was some time lag between the commission of offence and the preparation of FIR and since there was some meeting between Hiraben and her brother, it can be said that there was some time for them to see that other members of the family of the first accused also get involved in the incident. In some cases it may be a matter of practice to involve all the members of the family in an event though they may not be present or they may not have participated in the commission of offence. Therefore, here also since there was some time lag. It can also be said that the informant Hiraben and her brother had some time to see that all the members of the family of the deceased are involved in the incident in question. It is also to be seen that the brother of the informant Hiraben had accompanied the informant Hiraben to the office of the Advocate Mr V B Shah. It is true that Advocate Mr V B Shah has deposed at Exh.16 that he had prepared FIR at the instance of Hiraben and at that time her brother was also present. It is not unlikely that the brother may have participated in preparation of draft of FIR. At least there is some doubt in the truthfulness of the FIR so far the involvement of the present appellants Dahyabhai and Bai Champaben are concerned. It is more so when as said above, the deceased was already killed at the hands of the appellants Hamirbhai and Ratilal and therefore, there was no necessity for the present appellants Dahyabhai and Bai Champaben to deal further blows on the dead body of

the deceased. It is also required to be noted, as argued on behalf of the appellants, that before reaching the office of the learned Advocate Mr V B Shah, the informant Hiraben and her brother had to pass through some villages and towns where police stations or outposts were established. Instead of filing complaint or FIR before those police stations or outposts, they have directly approached Advocate Mr V B Shah. An attempt was made to show that there was some fear in the mind of the informant but at the same time, she was accompanied by her brother and therefore, there was no occasion or reason for any fear in the mind of the informant Hiraben. Moreover, it is not their case that they had gone to the police station at the police station has not recorded their FIR. They have not approached the Court of JMFC, Limdi or elsewhere. This also shows that instead of going to the police station or to the Court, the informant Hiraben and her brother thought it fit to approach Sr.Advocate of Wadhwan. Though it is not very much important for the purpose of deciding these appeals, it is a fact that Advocate Mr V B Shah has stated in his cross-examination that the brother of the informant was not his client but his father was the client of the father of Mr V B Shah who was also a practising Lawyer of Wadhwan. Mr V B Shah has also stated that the brother of the informant actually new him (Mr V B Shah). So there was some acquaintance between the brother of the informant and Mr V B Shah and that appears to have led the brother of the informant to approach Mr V B Shah for preparing the FIR. These facts also go to rise some doubts about the truthfulness of the version given in the FIR by the informant Hiraben.

11. Even at Wadhwan, Hiraben and her brother could have gone to the police station. Wadhwan is the Taluka Headquarter and police station has also been established at Wadhwan and, therefore, the FIR could have been lodged before Wadhwan Police Station also. Even Mr V B Shah could have directed them to go to Wadhwan police station for filing FIR. This has not been done. This shows that there is some room for doubt in the truthfulness in the versions given by the informant in the FIR as well as in her evidence.

12. Gora Raisingh at Exh.19 is the brother of the informant Hiraben who has deposed that Hiraben had not come to attend the marriage, he had gone to her village in a tractor and when he contacted Hiraben and enquired, above incident was narrated to him. He was naturally not a witness to the incident and, therefore, he would be required to say whatever is said to have been said to him

by Hiraben. His evidence is almost repetition of the evidence tendered by Hiraben and her son Jagdish.

13. The prosecution has examined two panch witness Zaver Dansingh and Jerambhai Mathurbhai at Exhs. 25 and 32 respectively. The panchnama has been prepared in their presence but both the Panchas have turned hostile and they have not supported the prosecution. It is not very much necessary to go through their evidence. PW 7 Jagmalbhai is the Head Constable of Panshina police station. He has been examined at exh.34. He received the FIR by Registered A.D. Post, on the basis of which he registered the offence against the appellants. Therefore, he does not know about the actual events on the spot. PW 8 is Head Constable Mangalsingh who had carried out initial investigation. He has been examined at Exh.36. He also is not a witness to the incident.

14. PW 9 is PSI-Prithvisinh of Chuda. He has been examined at Exh.37. Same way, PSI N G Vanzara has been examined at Exh.40, who has carried out investigation in the matter. So again the matter remains at the same stage that we have to appreciate the evidence of informant Hiraben and her son Jagdish at Exh.14 and 18 respectively. As said above, these are the two witnesses who are closely related to the deceased. The informant Hiraben is widow of the deceased and Jagmalbhai is the son of the deceased. As said above, deceased was already killed at the hands of original accused No.1 and 2 and, therefore, there was no necessity for Dahyabhai and Bai Champaben to inflict further blows on the dead body of the deceased.

15. Another aspect of the case is that the incident is said to have taken place at about 4.30 p.m. The houses of the parties are situated in a residential locality. It is the say of Hiraben and Jagdishbhai that they had raised shouts for the rescue of the deceased and for help. Since the houses are located in a residential locality, it would be quite natural that the persons staying in the neighbourhood would rush to the spot on hearing the shouts, particularly in the villages. Normally, the mentality of the village people would be to help neighbours but nobody had come to the spot, according to the say of the two witnesses. Same way, shots have been fired from Tamancha as well as gun. If the shouts raised by Hiraben and Jagdishbhai could not or did not attract the attention or notice of the neighbouring persons, these gunshots could have certainly attracted the attention of those neighbouring persons. When there was gun firing and tamancha firing, at least

neighbouring persons would doubt about something wrong and would rush to the spot even out of curiosity. This has not been done. Therefore, even evidence of these two witnesses has not been supported by those neighbouring persons. Even if they may not be present at the time when the actual incident took place, they could have given some version as to what happened on the spot after their arrival there and they could have given some version as to how the body of the deceased was dealt by the appellants. They could have given some version as to how the dead body of the deceased was disposed of. It is to be seen that the incident took place at 4.30 p.m. It did not take place either at 12 noon or at 12 midnight. Therefore, at 4.30 p.m., clearly the neighbouring persons would be at their residence. At least women neighbours would certainly be present at their residence. None of them has been examined which shows that the oral testimony of these interested eye witnesses has not been supported by probable witness who may be independent and natural witness to give some version about the happening of the incident. As said above, they could have said something about post-event facts and, therefore, even from that angle, we do not find any corroboration to the testimony of the mother and the son.

16. An attempt was made by the learned APP to argue that the dead body was burnt and some bones were traced out. Again there is no evidence to show that these bones were of a male person or of the deceased. In fact, there is no link to connect the said bones with the deceased and therefore, there is no link between the muddamal article and the present appellants. Therefore, there is no further link between the appellants and the event in question.

17. Even on the point of raising of shouts, there appears to be some sort of contradictory version. Son Jagdish has stated in his cross-examination that it is not true that he has not stated to the police that shouts were raised but nobody had appeared. It seems that this has not been stated by him to the police. This also shows that there was some doubt in the version given by the son. As stated earlier, the mother and the son are the only witnesses who are the two eye witnesses. There is some sort of enmity between the two families. They have been staying apart since years as stated by Hiraben. The event took place on a very small dispute on reconstruction of the roof and for digging the wall. In that view of the matter, we are of the opinion that on over all appreciation of the evidence, we find that evidence of the mother and the son is not reliable so far

as it relates to the role played by Dahyabhai and Bai Champaben. In our opinion, the evidence of these two witnesses is not trustworthy so far as these two appellants are concerned. Therefore, we are of the opinion that so far as these two witnesses are concerned, their evidence should not be accepted in full with respect to the role attributed to Dahyabhai and Bai Champaben. In that view of the matter, these two appellants will be entitled to benefit of doubt and therefore, on extending the said benefit of reasonable doubt, it would be necessary to allow the appeal and acquit the appellants of all the charges levelled against them.

18. For the foregoing reasons, we find that Criminal Appeal No.57/92 filed by Sankuben Hamir, being original accused No.5 in Sessions Case No.57/90 stands abated on account of her death. So far as Criminal Appeal No.81/92 is concerned, it also stands abated with respect to original accused Hamirbhai Chhaganbhai and Ratilal Hamirbhai being original accused No.1 and 2 in Sessions Case No.57/90, on account of their death.

19. Criminal Appeals No.81/92 and 182/92 filed by Dahyabhai Hamirbhai and Bai Champaben, wife of Dahyabhai respectively against their conviction for offences punishable under Section 302 read with Section 149 of the I.P.C. qua these two appellants are ordered to be allowed and the judgment and conviction order of the trial court against them are quashed and set aside. They are ordered to be acquitted of all the charges levelled against them and said to have been proved against them by the learned Sessions Judge. Since these two appellants Dahyabhai and Bai Champaben are at present on bail, their bail bonds stand cancelled.

20. We do not disturb the order with respect to the disposal of muddamal articles. Fine, if paid, to be refunded to the appellants - Dahyabhai Hamirbhai and Bai Champaben.

26.11.2001 [B J Shethna, J.]

[D P Buch, J.]

msp